United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1739

To be argued by
MEL P. BARKAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1739

Cal. No. 1118

UNITED STATES OF AMERICA,

Appellee,

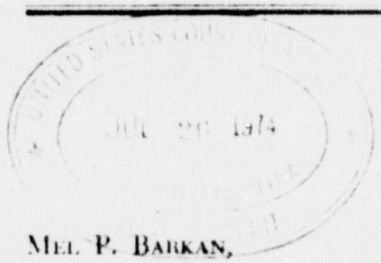
—v—

SOLOMON GLOVER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MEL P. BARKAN,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, of Counsel.

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Background 3

Issue 4

ARGUMENT:

Judges Brieant and Ward did not abuse their discretion in permitting Glover to be retried. Therefore, his retrial was not barred by the Double Jeopardy prohibition of the Fifth Amendment 5

CONCLUSION 22

TABLE OF CASES

Bruton v. *United States*, 391 U.S. 123 (1968) .. 3, 8, 10, 13,16

Downum v. *United States*, 372 U.S. 734 (1963) 19

Gori v. *United States*, 367 U.S. 364 (1961) 18

Green v. *United States*, 355 U.S. 184, 187 21

Harrington v. *California*, 395 U.S. 250, 254 (1969) 16

Illinois v. *Somerville*, 410 U.S. 458 (1973) 16

Logan v. *United States*, 144 U.S. 263 (1892) 19

Lovato v. *New Mexico*, 242 U.S. 199 (1916) 19

Simmons v. *United States*, 142 U.S. 148 (1891) 19

Thompson v. *United States*, 155 U.S. 271 (1894) 19

United States v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973) 15

PAGE

United States v. *Castellanos*, 478 F.2d 749, 751 (2d Cir. 1973) 18

United States ex rel. Joseph v. *LaVallee*, 415 F.2d 150, 153 (2d Cir. 1969) 16

United States ex rel. Nelson v. *Follette*, 430 F.2d 1055, 1058 (2d Cir. 1970) 16

United States ex rel. Ross v. *LaVallee*, 448 F.2d 552, 554 (2d Cir. 1971) 9

United States v. *Jorn*, 400 U.S. 470 (1971) 17

United States v. *Lipowitz*, 407 F.2d 597 (3d Cir.), *cert. denied sub nom. Smith* v. *United States*, 395 U.S. 946 (1966) 15

United States v. *Perez*, 9 Wheat. 579 (1824) 17

United States v. *Trudo*, 449 F.2d 649 (2d Cir. 1971), *cert. denied sub nom. Hoover* v. *Estelle, Corrections Director*, 409 U.S. 1086 (1972) 15

Wade v. *Hunter*, 336 U.S. 684 (1949) 17

Yates v. *United States*, 418 F.2d 1228 (6th Cir. 1969) .. 15

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1739

Cal. No. 1118

UNITED STATES OF AMERICA,

Appellee,

—v—

SOLOMON GLOVER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Solomon Glover appeals from a judgment of conviction entered on May 8, 1974 in the United States District Court for the Southern District of New York, after a two and a half day trial before the Honorable Robert J. Ward, United States District Judge, and jury.

Count I of Indictment 73 Cr. 327 (the only Count in which Glover was named) charged Glover and twelve others —Gennaro Zanfardino, John Campopiano, Oreste Abbamonte, Thomas Lentini, George Coumoutsos, Arcadio Boria, John Doe, a/k/a "Tommy", Benito Cortino, Jane Doe, a/k/a "Diosdada", John Roe, a/k/a "Roberto", Sabino Rios and Joseph Mack with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Section 846.

The trial of Solomon Glover commenced on March 18, 1974. At approximately noon on March 20, 1974, the jury found Glover guilty of the conspiracy charged in Count I.

On May 8, 1974, Glover was sentenced to a term of one year imprisonment with a special parole of three years to follow. He is presently released on bail pending appeal.

Of the remaining twelve defendants, three—Zanfardino, Campopiano and Boria—were found guilty by a jury on July 31, 1973, of all Counts charged against them in the indictment, after a two-week trial commencing on July 17, 1973 before the Honorable Charles L. Brieant, United States District Judge. Zanfardino was sentenced as a second narcotics offender to a term of twenty-five years imprisonment on Count I with a special parole of ten years to follow. Campopiano was sentenced as a second narcotics offender to a term of twenty years imprisonment with a special parole of ten years to follow. Boria was sentenced to a term of six years imprisonment with a special parole of nine years to follow. The convictions of Zanfardino, Campopiano and Boria were all affirmed by this Court (Docket No. 73-2516).

Of the remaining ten defendants, five—Abbamonte, Lentini, Coumoutsos, and Mack pled guilty prior to the commencement of trial and received sentences of between nine and thirteen years' imprisonment plus terms of special parole to follow. John Doe "Tommy" (identified upon his arrest as James Odierno) also pled guilty and was treated as a young adult offender, Cortino, Jane Doe, a/k/a "Diosdada", John Roe, a/k/a "Roberto" and Rios were not arrested and remain fugitives.

Background

Since on this appeal there is no question raised about the sufficiency of the evidence upon which the jury found Glover guilty, we will provide only the background relevant to Glover's claim that his trial was barred by the "double jeopardy" prohibition in the Fifth Amendment.

Glover originally went to trial with Zanfardino, Campopiano and Boria on July 17, 1973. After four days of trial, Judge Brieant felt compelled to declare a mistrial as to Glover and sever him from the case. The severance occurred after it had earlier appeared that Glover himself wanted a mistrial and severance in order to avoid a joint trial with such organized crime figures as Zanfardino and Campopiano. Another reason why Glover wanted severance from the joint trial was because everyone was aware that $100,000 in cash would be introduced in that trial as the recovered proceeds of an attempted bribe by Zanfardino and Campopiano to New York City policemen to destroy 106 reels of video tape to be used as evidence and to kill a government witness in that case.

However, Glover apparently foresaw the chance to put forward a double jeopardy argument and, surprisingly, withdrew his application for a severance on the fifth day of trial. The Government, to its surprise, found itself faced with the alternative of continuing the trial against Glover without using virtually any of its evidence of his culpability since Judge Brieant surprisingly ruled that Glover's admissions would violate the rights of his co-defendants under *Bruton* v. *United States*, 391 U.S. 123 (1968).

At that point Judge Brieant permitted the Government to move for a mistrial as to Glover and a severance of his case from the joint trial. The motion was granted.

Glover then attempted to avoid retrial and, on August 10, 1973, moved to dismiss the indictment against him on the ground that it was barred by the double jeopardy clause.

Judge Brieant in a 29 page opinion and order gave in detail his reasons for granting a mistrial and a severance as to Glover. He also thoroughly discussed all of the relevant law on double jeopardy, denied Glover's motion and ordered him to be retried.

Judge Brieant's opinion and order were filed on December 14, 1973. Thirty-one days later, in what apparently was dilatory tactic, Glover filed a Notice of Appeal from the interlocutory order by Judge Brieant. This necessitated a motion by the Government to dismiss that appeal which was heard by this Court on March 4, 1974. On March 8, 1974 the Court dismissed that appeal as untimely filed in violation of F.R. App. P. Rule 4(b). Upon the dismissal of that appeal, Glover's case was set down for trial before Judge Ward.

Issue

The only real issue on this appeal is whether Judge Brieant and Judge Ward abused their discretion in requiring Glover to proceed to the trial at which he was ultimately convicted.*

---

* A second "issue" is apparently raised in rather incomprehensible fashion as to the testimony of Special Agent Fred Gormandy of the Drug Enforcement Administration (Appellant's Br., "Point III"). Whatever the nature of this complaint it was denied by Judge Ward on the grounds, among others, that Gormandy's credibility was for the jury to decide (5/8/74 Tr., p. 11) and that any alleged newly discovered evidence "could have been discovered had counsel used due diligence" in the year since Glover's indictment. (*Ibid.*) The asserted point is frivolous.

ARGUMENT

Judges Brieant and Ward did not abuse their discretion in permitting Glover to be retried. Therefore, his retrial was not barred by the Double Jeopardy prohibition of the Fifth Amendment.

Because Judge Brieant's opinion and order fully sets forth in detail all his reasons for the granting of a mistrial and a severance as to Glover, and because it also states the law of double jeopardy in so complete a manner (in both accepting and rejecting the arguments put forward by the Government below), we find ourselves unable to improve upon it. We, therefore, will set it forth in full and rely, as did Judge Ward, totally upon its soundness.* The opinion reads as follows:

"Beginning on July 16, 1973, defendants Gennaro Zanfardino, John Campopiano, also known as Johnny Echoes, Arcadio Boria and movant, Solomon Glover, were brought to joint trial before the Court and a jury. On July 23, 1973, after four days of trial, the Court severed the case against defendant Glover, and directed a mistrial without his consent.

Defendant Glover raises by motion the issue of whether the prospective impanelling of another jury to try him would violate his constitutional rights, and specifically his rights under the Fifth Amendment of the United States Constitution not to be placed twice in jeopardy for the same crime.

Mr. Glover was originally indicted as one of 13 defendants. He was charged along with all of these defendants, with the crime of conspiracy to deal in scheduled narcotic drugs (cocaine and heroin). Co-defendants Oreste Abbamonte, Thomas Lentini, George Coumoutsos, James P.

---

* No factual finding by the District Court is questioned by Glover on this appeal. Glover argues only that its conclusion is wrong.

Odierno and Joseph Mack each pleaded guilty. Gennaro Zanfardino, John Campopiano and Arcadio Boria were each convicted at the conclusion of the jury trial previously referred to. Defendants Benito Cortino, Jane Doe, a/k/a Diosdada, John Roe, a/k/a Roberto, and Sabino Rios were never apprehended.

This indictment, and others, resulted from a remarkable, sustained cooperative effort between state (City of New York) law enforcement officials and federal agents of the Drug Enforcement Administration (formerly Bureau of Narcotics and Dangerous Drugs). The proof at trial showed a typical narcotics conspiracy of substantial size which had operated regularly and continuously in the District for almost two years.

Zanfardino and Campopiano were substantial traffickers in narcotics, on a scale which may be characterized as simply vast.[1] Their indictment and subsequent conviction resulted directly from the fortuitous apprehension and arrest of one Dolores Martinez, also known as "Dee Dee", who was an essential link in the marketing channels for narcotics utilized by the principal figures. These top level dealers wholesaled narcotics through various levels of less important conspirators, to the street addict purchaser for ultimate use.

Dee Dee had the information essential to the exposure of this ring. After her apprehension, she agreed to cooperate and testify for the Government. Her testimony resulted in the conviction of Zanfardino, Campopiano and Boria. The multi-tiered nature of the organization was such that she had no contact with Glover.

Prior to the start of trial, serious threats had been made against Dee Dee's life. Zanfardino, Campopiano, Lentini

---

[1] Each was a second narcotics offender, as defined by 21 U.S.C. § 841(b)(1)(a). [Footnote by the Court].

and Abbamonte, together with Louis Inglese, and Joseph Sparaccio, persons not involved in this indictment, were separately indicted (73 Cr. 651-ELP) for the crimes of bribery and obstruction of justice. They had agreed to pay $215,000.00 to obtain, among other things, Dee Dee's address, in order that she might be murdered. Of this bribe, $100,000.00 was paid in cash to two New York City policemen, posing as corruptible.

At the time of the trial, Dee Dee was in protective custody. The Government had agreed with her to arrange for her relocation in a new community, and to establish a new identity for her, upon the conclusion of this and other cases, because of a real continuing threat to her life.

Glover concededly had nothing to do with this high level organized crime activity engaged in by Zanfardino, Campopiano and others named. Viewing such evidence as was received or tendered, from a point of view most favorable to the Government, Glover's participation in the narcotics distribution conspiracy was minimal. He was at most a low level distributor.

The affidavit of Assistant United States Attorney Mel P. Barkan, sworn to October 2, 1973, read in opposition to this motion, states (p. 5) that written reports of three oral statements made by Glover, each of which implicated co-defendant Campopiano and others, "had been turned over to Glover's attorney earlier." See pp. 9, *et seq.* of Transcript of Pre-Trial Hearing held May 24, 1973. These statements however, were not turned over to the Court, and had never been viewed by the Court, until late in the afternoon of Friday, July 20, 1973. See pp. 716, *et seq.* of the transcript of trial for that date. There was also a fourth similar oral admission of Glover at pre-arraignment interview with AUSA Feffer.

Immediately upon viewing the reports of the oral statements of Glover, the Court advised counsel for the Government and all defendants, in a conference in the robing room (Tr. p. 716):

> "I would like to fill the day's work here, even if it means some disjointedness in the presentation. It looks to me as if an attempt to admit this statement . . . does present a *Bruton* problem, and possibly a problem greater than that.[2] So, I think I'll give you an opportunity to organize your thoughts on it and give me briefly what you have in mind on it. But it may present a problem here."

The discussion was inconclusive. The Government offered (Tr. pp. 717-18) to:

> "file a memorandum on the point of probable cause [for Glover's arrest without a warrant, and subsequent search] with your Honor hopefully late today, and also cover the *Bruton* problem as well."

Thereafter, in order to conserve the time of the jury, the testimony of a witness was taken not relating to the Glover admissions. This testimony was the first evidence received in the trial bearing upon the guilt of Glover.

The Government maintained that no *Bruton* problem existed with respect to Glover's statements. It proposed to redact from the testimony concerning the oral statement, as reduced to writing by Agent Fred Gormandy, all reference to co-defendant Campopiano, including mention of Campopiano's presence, together with Glover, Curtis and Abbamonte at 116th Street and Pleasant Avenue, in connection with the narcotics transaction. But, under the proposed redaction, Abbamonte's name would remain.

---

[2] Counsel had previously suggested that no probable cause existed for the arrest of Glover. The arrest led to the making of the statement. [Footnote by the Court].

Abbamonte was a co-defendant and conspirator who had pleaded guilty. His association with Zanfardino and Campopiano was extremely close, evidenced by the continual mention of his name in the testimony of Dee Dee, and also numerous scenes shown to the jury from 106 reels of video-tape photographed on Pleasant Avenue and showing Abbamonte, Campopiano, Zanfardino, Glover and others engaged in what appeared to be narcotics transactions, on the street, at all hours of the day and night.

Dee Dee's testimony and the video-tape tied in Campopiano and Abbamonte directly with the events detailed in Glover's confession, and the admission of the statement clearly would have been extremely prejudicial to Campopiano. The statement also, even if redacted as proposed, tied in with independent evidence of Officer Tuerack corroborated so much of the confession as referred to Abbamonte, Curtis and Glover, and their activities on October 27 and 30, 1972, at the Pleasant Avenue open-air narcotics mart. The direct testimony of Tuerack and the tapes had involved Campopiano with Glover, Curtis and Abbamonte, and had placed Campopiano there at the same times and places referred to in the disputed statement made by Glover.

Under the circumstances in which the proof would have been presented to the jury, it would have been impossible for the jury not to treat the statement, even with the proposed redactions, and notwithstanding any instructions which the Court might have given, as incriminatory of Campopiano, as well as incriminatory of Glover[3]

---

[3] See for example, *United States ex rel. Ross* v. *LaVallee*, 448 F.2d 552, 554 (2d Cir. 1971) in which the co-defendant when questioned about his selling of narcotic drugs replied, "Gee whiz, we're just trying to make a few bucks." The Court of Appeals held:

> "Petitioner contends that in the context in which it was made, this admission incriminates him, even though it

[Footnote continued on following page]

This, in sum, is what the entire teaching *Bruton* forbids. *Bruton* tells us that in a joint trial the introduction of the confession of one defendant which incriminates a co-defendant poses an unacceptable risk that the jury, despite instructions ot the contrary, will consider the confession in determining the guilt of the co-defendant in violation of his Sixth Amendment right of cross-examination. *Bruton* v. *United States*, 391 U.S. 123 (1968).

Here, elimination of references to Campopiano in the confession of Glover, as suggested by the Government, would not have removed the risk the *Bruton* holding was designed to obviate. The substance of the confession, viewed against the background of the other evidence admitted against Campopiano and Zanfardino would incriminate these defendants, and absolutely, though specific references to them were eliminated.

The witness Gormandy showed that he, acting as a Special Agent for DEA, was on Pleasant Avenue on October

---

did not refer to him by name. In the District Court Judge Foley concluded that 'the testimony of the detective to which petitioner now objects is not the type of 'powerfully incriminating' statements to which the Supreme Court referred in *Bruton*. As to whether this statement was incriminating, we must disagree. Petitioner was arrested with his brother. Given this context, there can be no doubt that his brother's reference to 'we' included petitioner. In this sense, the admission was damaging to petitioner's cause. Though petitioner was not mentioned by name, we have little doubt that he was incriminated by his brother's admission."

While the Court in *Ross, supra*, held, under the facts of the case the error was "harmless" as "the evidence . . . was so overwhelming that the jury would have convicted in any case," it nevertheless clearly held that admission of the statement violated petitioner's rights. We should not confuse the existence or non-existence of *Bruton* rights with the entirely separate question of what the sanction would be upon appeal, for their violation. [Footnote by the Court].

30, 1972, at 11:15 P.M. His purpose was surveillance against possible narcotics transactions taking place on the Avenue.

While engaged in such, surveillance, and in response to a radio signal, Gormandy moved into a position to take up surveillance of a Buick Riveria, white over green. As a result of a radio contact, he was looking for two black males driving that automobile. He saw the vehicle stop between 58th and 57th Streets on Second Avenue, facing south. He passed it and stopped on the next block. The Buick later passed him and went east on 56th Street into Sutton Place. He then entered East River Drive and initiated a chase of the Buick which proceeded north on the East River Drive at speeds exceeding 90 m.p.h. It turned off into Harlem River Drive, which it left by the 155th Street exit. He caught the vehicle at Seventh Avenue and 149th Street, where he pulled it over and arrested the occupants, who were Glover and Curtis. He transported them to the 32nd Precinct.

Direct examination of Gormandy had not been completed when the Government at its request and near the close of the day, sought to suspend (Tr. p. 750). The foregoing was the only proof elicited, to that point, against Glover. The Court believes, although the record does not so state expressly, that the prosecutor sought leave to suspend Gormandy's direct examination because it would have been at this time that the controversial statement incriminating Glover, Curtis, Campopiano and Zanfardino would have been reached in logical order and introduced.

An end-of-day conference of all counsel followed in the robing room. To the extent that the conference was not recorded by the court reporter, the Court rejects any reliance thereon. It would be impossible to conduct a lengthy, multi-defendant case if the Court were unable to have informal, unrecorded conferences with counsel, looking towards expediting the trial, and alerting the Court to potential difficulties, matters of scheduling and minor problems. No such

conferences were ever held except in the presence of both sides, prosecutor and defense counsel. Some informal interchange of ideas, without taking a position, is essential between the Court and counsel in order that the attorneys, as officers of the Court, may deal fairly with each other and with the Court in such conferences, without jeopardizing the rights of clients.

Whenever a matter of urgency is being discussed, the Court may hear it in open Court in presence of the defendants, which is this Court's ordinary procedure, or, alternatively, direct that a stenographic transcript be made in the robing room. But when, in a spirit of informality, proceedings take place in the robing room, which are, by direction of the Court or its inaction, not recorded, the Court should not rely on anything said at such conference to the detriment of a litigant. In its disposition of this motion, the Court rejects in the entirety, any suggestion that the defendant is estopped in any manner, or waived any rights as a result of proceedings not recorded.

The matter at page 756 of the stenographic record, taken the next morning, places the issue in context. It is clear that defendant Glover's counsel had been persisting in his continuous application for a severance and mistrial, and also that the Government had opposed such relief. When Glover, seeking to lay the foundation for the within motion, withdrew his application, the Court advised the prosecutor as follows:

> "You have two alternatives open to you Mr. Feffer. You may either proceed without using the statement[s], or you may move for a severance and mistrial."

The Government moved for a severance as to the defendant Glover. The Court ruled:

> "You see, I cannot permit the statement to be introduced. It would be unduly prejudicial even with

> redaction. I am sure these other defendants would not consent to any [admission in evidence, even with] redaction. They have indicated to me that that is their view and I think it is a proper one."

The Government's application was granted. The Court finds that the severance and mistrial was granted against the objection of defendant Glover, and the Government's contention that there was any waiver on his part or by his attorney is totally without foundation. See Tr. p. 757, in which the Court said:

> "The application for a severance and mistrial [by the Government] is granted, and you [*i.e.* Mr. Chance, Glover's counsel] have an exception."

In view of that ruling, and the express granting of an exception, it would have been inappropriate for Mr. Chance to have made any further objections or to have prolonged the record and delayed the trial with unnecessary speeches. That he did not do so may not redound to the detriment of his client on this motion. He did all that a trial advocate should be deemed required to do to make and preserve his point and protect his client's rights.

We are left therefore with simple questions which may be phrased thus:

1. When, as in this case, the prosecutor has proceeded in good faith with the joint trial of two or more defendants on a single indictment in a conspiracy case, and intends in good faith to use a redacted statement [confession] by one of the defendants believing in the evidentiary context of the entire trial that, if redacted, the statement will not be unduly prejudicial to other defendants, or violative of the teachings of *Bruton*, and the Court decides, to the surprise of the prosecutor, that the statement may not be used, may the Court grant a mistrial as to the confessing defendant and continue the trial as to the non-confessing defendant?

2. In reaching such a decision may the Court rely upon the fact that, as in this case, substantial evidence had already been received by the jury as against non-confessing defendants, but hardly any proof had been taken against the confessing defendant?

3. May the Court be guided by the fact that, as here, the non-confessing defendant is a major malefactor, and recidivist, in whose trial Society has an important stake, while the confessing defendant is a relatively minor wrongdoer?

4. May the Court's determination be affected by the expense and waste of resources which would have resulted in this case if a mistrial had been granted to Campopiano, and the trial continued as to Glover?

We think all the above questions are to be answered in the affirmative. Clearly, the Court was required either to allow the trial to proceed with respect to Glover, without using the confession so that a minor malefactor who has admitted his guilt on several occasions would be acquitted, and the interests of Justice defeated, or give a mistrial and severance to the substantial co-defendant Campopiano [and possibly also to Zanfardino, who may have had *Bruton* rights under the circumstances] with the result that several days of trial and considerable effort expended in guarding the life of Dee Dee would have gone for naught, and the case would have had to have been rescheduled later at a tremendous social and financial cost.

The propriety of our *Bruton* ruling requires consideration, but is not crucial to the determination of the double jeopardy issue in the absence of bad faith, prosecutorial misconduct or an intention of oppress. The *Bruton* case did not require that confessions never be admitted in joint trials. See 391 U.S. at 134. In this Circuit and elsewhere, properly redacted confessions have been held to satisfy *Bruton's* re-

quirements under the facts of particular cases. See, *e.g.*, *United States* v. *Trudo*, 449 F.2d 649 (2d Cir. 1971), *cert. denied sub nom. Hoover* v. *Estelle, Corrections Director*, 409 U.S. 1086 (1972); *United States* v. *Lipowitz*, 407 F.2d 597 (3d Cir.), *cert. denied sub nom. Smith* v. *United States*, 395 U.S. 946 (1966); *Yates* v. *United States*, 418 F.2d 1228 (6th Cir. 1969).

The instant case is distinguishable factually from *United States* v. *Trudo*, *supra*. There, the Court of Appeals found that confessions admitted in a joint trial raise a *Bruton* problem unless they in no way incriminate the co-defendants. The redacted confessions offered there were found to have been properly admitted because they "only inculpated the person making the admission." 449 F.2d at 652.

Here, under all the circumstances of this case, Mr. Glover's confession, even with the proposed redactions, would still incriminate his co-defendants when presented to the jury and considered by it in context with the video-tapes and all the other evidence in the case. Our ruling is consistent with the reasoning of *Trudo*.

But there was some support in theory at least for the Government's position, and the prosecutor was proceeding in good faith. In *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973), a Government agent on cross-examination, testified that one defendant's confession contained references to his co-defendants. One of the co-defendants moved to be severed. After denying his motion, the trial judge "promptly and carefully instructed the jury not to speculate as to the 'other defendants' mentioned in the confession." 467 F.2d at 623. This action was upheld on appeal:

> "In determining whether a co-defendant's *Bruton* rights are violated in situations analogous to the one before us, courts have interpreted *Bruton* to require

> reversal *only* if (1) the testimony concerning the complaining co-defendant is clearly inculpatory and (2) the testimony is vitally important to the government's case" (emphasis added) 467 F.2d at 623.

United States v. *Cassino, supra,* and cases cited therein, demonstrate that trial judges must exercise discretion in applying *Bruton* on a case by case basis. Accordingly, at that early stage of the trial, the Government was not so clearly wrong as to be in bad faith, in arguing that the Court might admit a redacted version of Mr. Glover's confession.

As an additional point, the Government urges that admission of Glover's confession would, at most, be harmless error beyond a reasonable doubt. See *Harrington* v. *California,* 395 U.S. 250, 254 (1969); *United States ex rel. Nelson* v. *Follette,* 430 F.2d 1055, 1058 (2d Cir. 1970); *United States ex rel. Joseph* v. *LaVallee,* 415 F.2d 150, 153 (2d Cir. 1969). But a Court should not commit "harmless error" knowingly.

Under all the circumstances of this case, exclusion of Mr. Glover's confession was necessary to protect the rights of co-defendants, and entirely consistent with the *Bruton* holding. In retrospect, the Government might have avoided the *Bruton* problem and the double jeopardy issue which it now raises had it anticipated the possibility of such a ruling, or had it tendered the issue at one of several pre-trial conferences held in the case. Nonetheless, at least when viewed prospectively, and prior to trial, the issue whether a redacted confession could have been received was one which reasonable men might have differed. As will be explained below, this point is of importance in determining whether a second trial would violate Mr. Glover's Fifth Amendment rights.

The Supreme Court, in *Illinois* v. *Somerville,* 410 U.S. 458 (1973), recently decided, has clarified the rule as to when declaration of a mistrial is justified and under what

circumstances the defendant may be retried without violation of his Fifth Amendment rights. The Court's opinion in *Somerville* relied upon a "manifest necessity" or "the ends of public justice" test, and in so doing held that: "the mistrial met the 'manifest necessity' requirement of our cases, since the court could reasonably have concluded that the 'ends of public justice' would be defeated by having allowed the trial to continue." 410 U.S. at 459. *Somerville,* and its progenitors provide that the declaration of a mistrial due to prosecutorial procedural error does not always bar a retrial.

The "manifest necessity" standard was pronounced nearly one hundred fifty years ago in the landmark decision, *United States* v. *Perez,* 9 Wheat. 579 (1824).

> "[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere." 9 Wheat. at 580.

To the present, no mechanical rules for the application of that abstract criterion has been stated, nor could they be. Supreme Court and lower court decisions, following *Perez* have adhered to its instruction that in applying the test all circumstances are to be taken into account. *United States* v. *Jorn,* 400 U.S. 470 (1971); *Wade* v. *Hunter,* 336 U.S. 684 (1949).

> [T]he essential question in each case involving double jeopardy contentions after the declaration of a mistrial has been whether the trial judge abused his discretion in terminating the trial short of verdict."

United States v. *Castellanos*, 478 F.2d 749, 751 (2d Cir. 1973).

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Gori* v. *United States*, 367 U.S. 364 (1961).

What constitutes abuse of discretion can only be determined by examining prior case law. See *Illinios* v. *Somerville*, 410 U.S. at 463-64.

In *Somerville*, the defendant was indicted before an Illinois grand jury for the crime of theft. After the jury had been impanelled and sworn, the prosecution realized that the indictment was procedurally deficient under Illinois law. The defect was "jurisdictional". If this case proceeded to trial and the defendant were found guilty, his conviction would be reversed on appeal, and he would have been retried. Under these circumstances the trial judge concluded, with reason, that it was useless to proceed further and granted the prosecuting attorney's motion for a mistrial. Mr. Somerville, convicted after a second trial, sought post conviction relief based on his Fifth Amendment right not to be placed in jeopardy twice for the same crime. The Supreme Court found that the trial judge had not abused his discretion.

The *Somerville* opinion briefly discussed the facts operative in some of the earlier decisions in which the "manifest necessity" test had been applied. The Supreme Court concluded that "virtually all of the cases turn on the particular facts and thus escape meaningful categorization." 410 U.S.

at 404.[4] However, more extended treatment was accorded *Downum* v. *United States*, 372 U.S. 734 (1963), one of the cases on which Mr. Somerville placed heavy reliance. The *Somerville* court's discussion of *Downum* is of particular interest to us.

In *Downum* the defendant was charged with six counts of mail theft, and forging and uttering stolen checks. The Government knew that its key witness on two of the six counts had not been found and had not been served with a subpoena, yet it allowed a jury to be selected and sworn. A short time later, before any evidence had been offered, the Government apparently discovered its mistake and moved for a mistrial on the ground that its key witness was not present. The motion was granted over defendant's objection as was his motion to dismiss two counts for failure to prosecute. At a second trial, begun two days later, the defendant's plea of double jeopardy was overruled, and he was convicted on all six counts. The Supreme Court reversed, finding that the absence of the witness did not warrant a mistrial.

---

[4] Illustrative factual circumstances under which the "manifest necessity" test was found to have been satisfied are: *Wade* v. *Hunter*, 336 U.S. 684 (1949), a mistrial was declared when military tactical considerations made necessary the withdrawal of a charge in a court martial; *Lovato* v. *New Mexico*, 242 U.S. 199 (1916), the defendant demurred to the indictment, a jury was sworn, but then dismissed when the prosecutor realized that the defendant had not pleaded; *Thompson* v. *United States*, 155 U.S. 271 (1894), a mistrial was declared when the trial judge discovered that one of the jurors had served on the grand jury which voted the indictment; *Logan* v. *United States*, 144 U.S. 263 (1892), a mistrial was declared when the jury was unable to agree on a verdict after forty hours of deliberation; *Simmons* v. *United States*, 142 U.S. 148 (1891), a mistrial was declared when the trial judge discovered that one of the jurors knew the defendant. [Footnote by the Court].

The *Downum* case was characterized by Mr. Justice Rehnquist, writing for the Court in *Somerville*, as a situation "where the mistrial entailed not only a delay for the defendant, but also operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." 410 U.S. at 469. By contrast, the Court found that the *Somerville* trial judge's action was:

> ". . . a rational determination designed to implement a legitimate [Illinois] state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant. . . . We cannot say that the declaration of a mistrial was not required by 'manifest necessity' and the 'ends of public justice'." 410 U.S. at 469.

The case before us is unlike *Downum*, where the prosecutor's conduct was so negligent as to constitute a callous disregard for the defendant's rights. Here, as has already been discussed, the Government was not clearly in such error as to constitute bad faith, either in joining Glover or in arguing that the confession could be admitted in redacted form. Here, also unlike *Downum*, the prosecution did not seek a mistrial so that it would be able to strengthen its case against Mr. Glover. The procedure the Government has followed has not been manipulated so as to prejudice movant.

The instant case is also unlike *United States* v. *Jorn*, 400 U.S. 470 (1971), where the trial judge granted a mistrial, *sua sponte*, when he concluded that defendant taxpayers had not been adequately warned of their constitutional rights before speaking to the Internal Revenue Service. The Supreme Court, per Mr. Justice Harlan, found that the trial judge abused his discretion by "abruptly" declaring a mistrial without taking into account all the circumstances of the case, and without fully hearing counsel's arguments. *United States* v. *Jorn*, 400 U.S. at 487.

Here, we declared a mistrial only after careful consideration of all the circumstances and extended discussions with counsel, who were allowed to ponder the problem over a week-end. We decline to place great weight on the Government's suggestion that Mr. Glover has "benefitted (sic) from the severance and has not shown or even alleged any 'embarrassment, expense and ordeal and . . . anxiety or insecurity' as a result thereof." Gov't. Memo. p. 27, quoting *Green* v. *United States*, 355 U.S. 184, 187.

United States v. *Jorn, supra,* a later case, has discredited the application of such considerations where the mistrial was not declared in the sole interest of the defendant. 400 U.S. at 483. Here, we are not in a position to make a *post hoc* evaluation as to which party, the Government or Mr. Glover, benefited most from our declaration of a mistrial. It is true that Mr. Glover was spared a joint trial with narcotics wholesalers so rich and powerful that they had attempted to bribe police officers with $215,000.00.[5] But the Government was also benefited by the mistrial because it did not have to proceed without its most incriminating evidence, Mr. Glover's confession.

Society had the greater interest, for the reasons aforementioned, in completing the trial of Campopiano and severing Glover for retrial. Coming as it did, when the prosecutor had barely begun to elicit evidence against Glover, the granting of a mistrial effected no significant prejudice of a material nature, with respect to his rights.* This case pre-

---

[5] The Government had seized that part of the bribe actually paid, consisting of $100,000.00 in bills of $100.00 and smaller denominations. This currency was admitted in evidence, but solely against Zanfardino and Campopiano, as proof of consciousness of guilt. Most jurors had never seen so much green goods in one place at one time. [Footnote by the Court].

* In fact Glover was able to discover the Government's whole case against him, stay out of jail for almost a year, and, in fact, was subjected to less actual trial time than if he had continued his first trial. [Footnote added].

sents a clear example of "some important countervailing interest of proper judicial administration" (*Illinois* v. *Somerville*, 410 U.S. 458, 471, citing *United States* v. *Jorn*, 400 U.S. 470). Here "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public Justice." (*Illinois* v. *Somerville*, *supra*, at p. 471, citing *Wade* v. *Hunter*, 336 U.S. 684).

Retrial of Mr. Glover is not barred by the Constitutional prohibition of double jeopardy. The motion is in all respects denied.

Following a period of ten (10) days to permit such other and further proceedings, if any, as the parties may consider appropriate to be conducted before me, this proceeding will be submitted to the Assignment Committee of this Court for reassignment to another Judge for retrial pursuant to Rule 16 of the Local IAC Rules.

Glover after an untimely attempt to appeal the decision by Judge Brieant, was convicted after trial before Judge Ward and a jury.

CONCLUSION

The judgment of conviction against Glover should be affirmed since neither Judge Brieant nor Judge Ward abused his discretion in permitting Glover's retrial.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MEL P. BARKAN,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MEL P. BARKAN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 26th day of July, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

William C. Chance, Jr.
Chance, Reid + Sena
70 Lafayette Street
New York, N.Y. 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Mel P. Barkan

Sworn to before me this
26th day of July, 1974

Mary L. Avent

MARY L. AVENT,
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. Filed in Bronx County
Commission Expires March 30, 1975